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Comments

CRIMINAL LAW—GRANTING BAIL TO INDIGENT DEFENDANT

*Bandy v. United States*¹

Defendant Bandy was convicted on six counts of fraudulent filing of income tax returns. On appeal he sought leave to proceed in forma pauperis. This request was denied as a result of the district court's certification that the appeal was not taken in good faith and was frivolous.² Bandy then petitioned the Supreme Court for a writ of certiorari as to denial of the appeal. While disposition of this petition was pending, Justice Douglas set bail at \$5,000.³ Bandy then applied to Justice Douglas for a release on "personal recognizance pending certiorari," stating that he was "unable to give security for the prescribed bond."⁴ The application was denied without prejudice for a renewed application in the lower court. Upon subsequent denial of the application in the lower court,⁵ Bandy petitioned the Supreme Court for a writ of certiorari to review the lower court's denial of reduction of bail. Pending disposition of that petition, Bandy once again applied to Justice Douglas for release on "personal recognizance," pleading his inability to meet bail. Justice Douglas again denied relief.⁶ Were the foregoing all that occurred, there would be little need to discuss this case. But in addition, this question was considered: "Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?" Justice Douglas concluded that no man should be denied release because of in-

1. *Bandy v. United States*, 369 U.S. 815 (1961).

2. *Bandy v. United States*, 278 F.2d 215, 216 (8th Cir. 1959). The court denied the application on the basis of Rule 39(a) of the FED. R. CRIM. P. under which a defendant is to be denied leave to proceed in forma pauperis if his appeal is shown to be in bad faith by a certification from the district court. The court also stated the appeal was frivolous under the test established in *Ellis v. United States*, 356 U.S. 674 (1958).

3. *Bandy v. United States*, 364 U.S. 477 (1960).

4. *Bandy v. United States*, 81 S.Ct. 197 (1960).

5. *Id.* at 198. The application was denied because the Supreme Court, in a *per curiam* decision on the same day, had granted the motion for leave to proceed in forma pauperis and had granted the petition for a writ of certiorari. However the Supreme Court had remanded the case to the court of appeals for a hearing of the appeal.

6. *Bandy v. United States*, 369 U.S. 815 (1961). The application was denied because if relief was granted by a single Justice, the petition for certiorari to review the Court of Appeals' denial of reduction of bail would be a moot question. Therefore relief would not be granted until the Supreme Court had resolved the question of whether a single Justice had the power to fix bail pending disposition of a petition for certiorari to review the denial of reduction of bail.

digence where other relevant factors⁷ make it reasonable to believe that he will comply with the orders of the court.⁸

It is the purpose of this comment to discuss the implications of this statement. The constitutional mandates in the area of bail have been at best rather nebulous, and conceivably, Justice Douglas' statement may have an important bearing upon future treatment of this problem.

I. FEDERAL CASES

The purpose of bail is to insure that an accused will be present when required to face the charges against him, without the need for incarceration.⁹ Therefore, bail must be fixed at a level calculated to assure this presence, as determined by the judge according to the circumstances of the case.¹⁰

On the other hand, the eighth amendment states that "excessive bail shall not be required."¹¹ In *Stack v. Boyle*,¹² the Supreme Court held that it would be unconstitutional to set bail at a high level in order to assure that a defendant will not gain his freedom.¹³

The task then, is to strike a practical balance, a happy medium between an amount of bail which the defendant is able to meet and an amount which is high enough to insure the defendant's presence.

One obviously relevant standard in determining what constitutes excessive bail is the "financial ability of the defendant to give bail."¹⁴ This was early recognized in *United States v. Brawner*.¹⁵ There the defendant, who was arrested for counterfeiting, swore on his oath that he could not give bail for the allotted amount. The court, in reducing bail, said: "to require larger bail than the prisoner could give

7. FED. R. CRIM. P. 46(c). "If the defendant is admitted to bail, the amount thereof shall be such as in the judgment of the commissioner, or court, or judge, or justice will insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant."

8. *Bandy v. United States*, 369 U.S. 815, 816 (1961).

9. *Bandy v. United States*, 81 S.Ct. 197 (1960); *Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Foster*, 278 F.2d 567 (2d Cir. 1960); *Reynolds v. United States*, 267 F.2d 235 (9th Cir. 1959); *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002 (2d Cir. 1946); *State v. Clark*, 234 Iowa 338, 341, 11 N.W.2d 722, 724 (1943), cert. denied, 323 U.S. 739 (1944); *Craig v. Commonwealth*, 288 Ky. 157, 161, 155 S.W.2d 768, 770 (1941); *State v. Chivers*, 198 La. 1098, 1102, 5 So.2d 363, 364 (1941); *Ex parte Malley*, 50 Nev. 248, 256, 256 Pac. 512, 514 (1927).

10. *Stack v. Boyle*, 342 U.S. 1 (1951); *United States v. Weiss*, 233 F.2d 463 (7th Cir. 1956); *Heikkinen v. United States*, 208 F.2d 738 (7th Cir. 1953); *Firest v. United States*, 203 F.2d 83 (8th Cir. 1953); *United States ex rel. Rubinstein v. Mulcahy*, 155 F.2d 1002 (2d Cir. 1946); *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927). See also Comment, 102 U. PA. L. REV. 1031, n.1 (1954).

11. U.S. CONST. amend. VIII. It is to be noted that this provision is in Mo. CONST. art. 1, § 21.

12. 342 U.S. 1 (1951).

13. *Id.* at 4.

14. FED. R. CRIM. P. 46(c).

15. 7 FED. 86 (W.D. Tenn. 1881).

would be to require excessive bail and to deny bail in a case clearlyailable by law."¹⁶ However, this test has never been literally applied and has been modified by later decisions. For instance, in *Bennett v. United States*,¹⁷ the court, in granting bail to the defendant pending appeal, stated: "The amount of the bail bond in a criminal case is largely determined by the ability of the defendant to give it . . . and what would be reasonable bail in the case of one defendant may be excessive in the case of another."¹⁸

Later cases have indicated that, while financial ability is admittedly a factor to be considered, it is not so important as the early cases indicate.¹⁹ In *State v. Chivers*,²⁰ for instance, the defendant was arrested on charges of embezzlement, and his bond fixed at \$5,000. He made application for reduction of bail, stating that he was unable to raise the amount fixed. The court, in ruling upon his application, said that in setting the amount of bail some consideration should be given to the financial circumstances of the accused, but that "the mere fact that a defendant cannot make bond, as fixed by the trial judge, does not necessarily render the amount excessive."²¹

Although the indigence of a defendant has been recognized as a factor to be considered in setting bail, indigence alone will not be sufficient to reduce bail or to effect the accused's release without bail. Thus, in *United States v. Rumich*,²² it was said that "A person arrested upon a criminal charge, who cannot give bail, has no recourse but to move for trial."²³ Such a holding does not recognize any form of relief to the indigent as a matter of right, and appears to represent the general attitude of the courts on this question.²⁴ However, decisions of this type apparently do not reflect the consideration whether other deterrents to flight could be substituted for bail.

Rule 46 (d) of the Federal Rules of Criminal Procedure provides that "in proper cases no security need be required."²⁵ This rule allows for dispensing with the requirement of security for bond in cases where there are other reasonable ways of assuring the defendant's presence at trial; e.g., the ties of friends and family, long residence in the locality, and the efficiency of the modern police.²⁶ These other deterrents become especially important when the defendant is an

16. *Id.* at 89.

17. 36 F.2d 475 (5th Cir. 1929).

18. *Id.* at 477.

19. E.g., *Ex parte Malley*, 50 Nev. 248, 251, 256 Pac. 512, 514 (1927).

20. 198 La. 1098, 5 So.2d 363 (1941).

21. *Id.* at 1099, 5 So.2d at 364. See also *State v. Alvarez*, 182 La. 50, 161 So. 17 (1935); *Heard v. Clark*, 156 Miss. 355, 126 So. 43 (1930); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927).

22. 180 F.2d 575 (2d Cir. 1950).

23. *Id.* at 576.

24. *United States v. Rumrich*, 180 F.2d 575 (2d Cir. 1950); *State v. Chivers*, 198 La. 1098, 5 So.2d 363 (1941); *State v. Alvarez*, 182 La. 50, 161 So. 17 (1935); *Ex parte Oliver*, 127 Miss. 208, 89 So. 915 (1921); *Ex parte Malley*, 50 Nev. 248, 256 Pac. 512 (1927).

25. FED. R. CRIM. P. 46(d).

26. *Bandy v. United States*, 369 U.S. 815, 816 (1961).

indigent, because the setting of bail in any amount in such a case will have the effect of denying him release.²⁷ Therefore, it would be proper, in cases involving indigents, to examine each case closely in order to discover if the facts of the case are such that the other deterrents would be effective to insure the accused's presence for trial. Otherwise, a serious question of equal protection may be raised.

II. MISSOURI CASES

In Missouri, the allowance of bail is initially guided by the Missouri Constitution, which, like the eighth amendment, states that "excessive bail shall not be required."²⁸ As with the federal constitution, however, there are no provisions for deciding what is "excessive bail," and accordingly this question is left to other sources for determination.

One such source is § 544.470, RSMo. 1959, which provides in part: "If . . . sufficient bail be not offered, the prisoner shall be committed to . . . jail . . ."²⁹ This section admits of no relief to the indigent who cannot furnish sufficient bail, and unlike the Federal Rules of Criminal Procedure,³⁰ does not list the guiding factors for determining the amount of bail. However, financial ability was mentioned as a guiding factor in *Ex parte Verden*,³¹ a 1922 Missouri case. There the accused was indicted for a capital offense, and was denied bail. Accused then petitioned for a writ of habeas corpus to procure his discharge on bail. The court, in granting bail to the accused, mentioned in passing that the amount of bail should be determined "in view of all the circumstances in the case" and the "ability of the accused to give it."³² It should be noted that the issue in the *Verden*³³ case was not how the amount of bail should be determined, but whether bail should be granted. Therefore, although this decision did mention financial ability as a relevant factor, the court did not imply that it should be the determinative factor. It would appear then that the law of Missouri is not out of accord with other jurisdictions, in that if the accused cannot meet bail he must be incarcerated.

This leaves for determination the final question of whether, in cases of indigent defendants, bail may be waived if other factors exist which will act as deterrents to flight in view of the facts of the case and the character of the defendant. In *Ex parte Chandler*,³⁴ the court made several statements recognizing that the existence of other deterrents to flight should have a definite effect on the amount of bail set in a given case. The defendant, who admittedly had no property, was in custody on a charge of rape and was proceeding in habeas corpus for reduction of bail. The court, in reducing the bail from \$15,000 to \$10,000, said

27. See Foote, *Foreword to Comment on the New York Bail Study*, 106 U. PA. L. REV. 685, 690-91 (1958); Comment, 106 U. PA. L. REV. 693, 722-29 (1958); Comment, 102 U. PA. L. REV. 1031, 1048-59 (1952).

28. Mo. CONST. art. 1, § 1.

29. § 544.470, RSMo 1959.

30. See statute cited *supra* note 8.

31. 291 Mo. 552, 237 S.W. 734 (1922).

32. *Id.* at 554, 237 S.W. at 737.

33. *Ex parte Verden*, 291 Mo. 552, 237 S.W. 734 (1922).

34. *Ex parte Chandler*, 297 S.W.2d 616 (Spr. Mo. App. 1957).

"In determining the amount of bail it is necessary to consider the nature of the charge and the surrounding circumstances, for an accused might more easily succumb to the temptation to flee from some charges and under some circumstances than others."³⁵ The court went on to say that it knew nothing about the defendant: whether he was settled in his affairs, whether he had a good reputation, or whether he had been charged with similar offenses.³⁶ The court, by its language, suggested that if it had known more about the defendant it would have been possible to lower the amount of bail even further. Although the court does not say that these other factors could be used in lieu of bail, it appears that the idea presented by the court is only one step removed from the theory expounded by Justice Douglas.³⁷ It would seem then, that at least one Missouri decision recognized that other factors may be used as a deterrent to flight, if the defendant is an indigent and is entitled to release on bail.

III. CONCLUSION

The remarks in the opinion of Justice Douglas obviously are in conflict with the traditional bail practices that are currently being followed in the United States. His belief that an indigent defendant might be allowed freedom on "personal recognizance" where there are other relevant factors to insure his presence at trial, is a definite departure from practical bail theory and application. If the procedure suggested is applied strictly to those indigents who are subject to other deterrents, it might not be objectionable. However, it would be a difficult discretionary question for the trial judge to determine the strength of these other deterrents.

It is submitted that in proper cases the practices suggested in the opinion should be applied to those indigents when the court, after diligent investigation, is satisfied that sufficient non-proprietary deterrents to flight exist, thereby assuring the presence of the indigent for trial, and avoiding any question of equal protection in those cases where the accused is denied release solely because of his indigence.

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35. *Id.* at 617.

36. *Ibid.*

37. *Bandy v. United States* 369 U.S. 815 (1961).